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87-1315

Supreme Court, U.S.
FILED
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CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

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CHARLES DEASY, Personal Representative
of the Estate of Ginger Deasy, Deceased,

Petitioner,

vs.

ELIZABETH HILL, M.D.

Respondent.

****

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

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QUESTIONS PRESENTED

1. When a District Court has denied a motion to amend a complaint, not on the basis permitted by Federal Rule of Procedure 15 governing amendments to pleadings in federal cases, but improperly, on the basis of a state statute, was it in violation of due process of the Circuit Court of Appeals for the Fourth Circuit to affirm on the basis of its own finding of prejudice to the defendant on the merits when the defendant opposing the amendment had set forth no prejudice and made no contention of prejudice at the district court, or in the Circuit Court of Appeals.

2. Is it a violation of due process for a Circuit Court of Appeals to ratify denial of a trial on the merits of a most significant issue of the plaintiff's claim by making its own finding of fact with regard to prejudice, when there had been no factual basis presented at the district court

level and no finding of prejudice by the district court which had denied the amendment on another ground.

3. Where the district court had denied amendment because of a state statute which would, in effect, abrogate amendment under the Federal Rules of Civil Procedure, can the Court of Appeals, denying that its ruling of affirmance is on the same basis, affirm the denial of amendment on grounds of prejudice to the defendant in the presentation of its case on the merits when such contention was not argued or urged by the defendant in opposing the amendment at the district court level, or in the defendant's brief or argument in the circuit court and in doing so, does the circuit court violate the due process clause of the Constitution.

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PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

****

COMES NOW your Petitioner, Charles Deasy, Personal Representative of the Estate of Ginger Deasy, deceased, by and through this application and respectfully prays this honorable Court to preserve Due Process as set forth in Amendment V and Amendment XIV of the United States

Constitution and issue a Writ of Certiorari to review the judgment and order of the United States Court of Appeals for the Fourth Circuit entered on November 9, 1987.

OPINIONS BELOW

The judgment and order of the United States Court of Appeals, issued with the opinion is set forth in the Appendix. (App. 1)

The Order of the District Court for the Eastern District of Virginia, Alexandria Division, is set forth in the Proceedings. (App. 45, 46.)

JURISDICTION

The Fourth Circuit's judgment became final on November 9, 1987. The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C.A. §1254 (1) and Rule 17, Rules Of The Supreme Court, as amended in 1980.

STATUTES INVOLVED

The principles of law involved herein are found in Rule 1 and Rule 15 of The Federal Rules Of Civil Procedure and Amendments V and XIV of the United States Constitution.

STATEMENT OF THE CASE

Charles Deasy and his wife, Ginger, brought a medical malpractice action against Elizabeth Hill, M.D., alleging that the latter's negligence diminished Ginger's chances of surviving cancer of the cervix. They alleged that Hill failed to notify Ginger of the abnormal results of a Pap smear or the need for re-examination. After Ginger died, shortly before trial, Charles Deasy moved to amend his complaint to assert a claim for wrongful death, and in doing so asserted a claim that defendant Hill had performed the Pap smear negligently, an assertion which had been made three months before in plaintiff's 26(b)(4)(A) Contentions of Expert Witnesses (App. 18-27). The District Court refused to allow the amendment (App. 45, 46), and the case proceeded to trial solely on the issue of defendant Hill's alleged failure of notification. The jury returned a verdict for defendant Hill, and Charles Deasy appealed the District Court's refusal to allow amendment of the complaint.

The Fourth Circuit Court of Appeals affirmed,

stating that a motion to amend under Rule 15(a) may be denied where the motion has been unduly delayed, and where allowing the amendment would unduly prejudice the non-movant. The Circuit Court found that: "Undue delay and prejudice are both present in this case." (App. 6)

The original complaint alleged malpractice in defendant Hill's failure to inform patient Deasy of the result of the Pap smear, and in her failure to re-examine plaintiff Deasy. The complaint filed April 9, 1986, made no mention of Hill's allegedly negligent performance of the Pap smear itself. As a result of discovery and investigation, however, in July 1986, plaintiff informed the defendant of the enlarged claim by filing expert witness statements pursuant to Federal Rules of Civil Procedure 26(b)(4)(A), which stated that the defendant had been negligent in her performance of the Pap smear. (App.18-27) The Circuit Court stated that: "Despite his awareness of this alleged negligence, plaintiff did not act to amend his complaint until nearly three months later, just before trial, in October

1986." The Circuit Court held that in the circumstances of this case, plaintiff's delay was undue. "Plaintiff failed to offer to the Trial Court, and does not offer here, any reason for his delay. In fact, plaintiff's argument that defendant was not surprised by the new claim because she had been aware of it through the expert witness statements, shows the absence of any such reason."

Because of the expert witnesses' contentions, and the defendant's actions in deposing the witnesses, no amendment had been sought. The defendant was cognizant of the contentions and had responded to them, and no formal change in the complaint was needed to insure that there was no prejudice. After the death of Ginger Deasy, an amendment to designate the successor plaintiff and to convert the personal injury claim to one of wrongful death was required. The amended complaint set forth allegations of negligent performance of the Pap smear which prevented the learning of the seriousness of the condition which would have permitted a 14 month earlier diagnosis,

as well as the original allegation, the failure to notify and to followup with re-examination within six months, which would have brought about an 8 month earlier diagnosis.

The hearing on the motion came shortly before the scheduled trial of October 14, and did not seek to add a new substantial matter to the case, but only a new formal amendment to the complaint of a matter which had long since been part of the discovery proceeding of both parties.

The defendant opposed the motion to amend, but did so, not on the basis of prejudice in the defense of the allegation of negligent performance, but on the basis of a Virginia medical malpractice statute which would, in effect, if interpreted as the District Court misinterpreted it, foreclose amendment of any complaint in a federal case. The Virginia statute provides that before a complaint can be filed, there must be an opportunity for a defendant physician to seek a medical malpractice arbitration panel. That opportunity arises when the physician is notified in advance of trial of

the basis of the claim. In this instance the defendant was so notified.*[1].

The notification was precisely in the terms and words of the complaint, which had alleged negligence regarding notification of the mildly abnormal results the Pap smear of January 13, 1984, but it did not allege a failure to sample all of the cervix in obtaining the smear, which was the essence of the 26(b)4(A) Contentions of Experts, and as set forth in the proposed Amended Complaint.

Upon receiving that notification, prior to the filing of suit, the defendant did not seek to have a medical malpractice panel, and sought to have the case tried in the United States District Court for the Eastern District of Virginia, Alexandria Division.

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*1 The original complaint filed by the plaintiff herein in the United States District Court had been dismissed as premature, but was considered by the District Court in an earlier proceeding to have been constituted as adequate notice under the Virginia statute requiring a plaintiff to notify a physician in advance of filing suit.

However, when the plaintiff sought to amend, formally the complaint, to incorporate an allegation of negligence which had entered the case early in the discovery process, and three months before trial, the defendant opposed the motion because she waived the opportunity to have an arbitration on the first complaint, but claimed she would not have done so if the allegation of negligent performance had been originally pleaded. (App. 43, 44)

The defendant did not allege or argue that she was prejudiced in the defense of the claim on the merits, and she did not allege that she did not have an opportunity for discovery, since she had deposed both the witnesses after the contentions in the 26(b)(4)(A) Answer to Interrogatories had first asserted the negligence claim. (App. 29 -35, 37-46)

Argument before the magistrate did not include any allegation of prejudice, (App. 37-46), nor did the appeal brief of the defendant.

The denial of the motion by the magistrate did not set forth findings of facts or

conclusions, (App. 45-46), nor did his remarks at the time of the hearing, but there had been no inquiry upon which a factual determination could have been made by this magistrate with regard to prejudice to the defendant flowing from the amendment. (App. 37-46)

The case was tried solely upon the issue of failure to notify of the mildly abnormal results of the inadequate Pap smear, not the allegation that the negligently taken test failed to discover a more advanced state of the condition mandating immediate surgical intervention.

Despite the fact that the defendant had not claimed that she would be prejudiced by the claim of negligent performance of the Pap smear on the merits of that claim at any stage of the proceeding before the magistrate of the District Court, or as part of the appeal, the Circuit Court nevertheless made a factual finding which defendant Hill had not herself advanced; the Circuit Court stated as follows:

> "We do not believe, however, that Hill had the opportunity to which

she was entitled for discovery on the issue. A complaint is meant to state the issues of a case so that the parties can conduct discovery and present their case intelligently. Hinting at a claim in an expert witness statement, leaves the opposing party guessing at one's real intention. The original complaint led defendant to believe that plaintiff did not claim negligent performance, and defendant could quite sensibly have decided not to commit her resources to a shadowy claim that plaintiff may or may not have been serious about raising. Defendant may have deposed plaintiff's experts on the issues; that was a natural precaution since the issue was raised in their statements. But defendant did not make any affirmative effort to disprove negligent performance. She did not, for example, hire her own experts to testify that her performance of the Pap smear was not negligent, and it is doubtful that she would have had time to do so before trial. It would be manifestly unfair to require defendant to go to trial

> without a fair opportunity to prepare her case, or take anything more than the most minimal precautionary measures. (App. 9,10)

The Court of Appeals does not set forth its basis for finding that the defendant did not make an affirmative effort to disprove the negligent performance. The defendant did not do so during the trial because the issue of negligent performance had been extirpated by the pre-trial action of the magistrate in denying the Motion to Amend. The defendant did hire her own experts to testify, and had prepared, and has designated as experts several witnesses, including a gynecologist and a gynecological surgeon. The defendant, who had three months notice of the contentions of the plaintiff never asserted that these expert witnesses were unprepared or unready to testify on that issue or the consequences of such a negligent failure to properly take the Pap smear. The defendant never alleged that she would require additional time for discovery, necessitating a continuation of the case.

(App. 37-46)

The Circuit Court demonstrated the importance it attached to the delay in formal amendment as contrasted to the matter of substance, the existence or non-existence of prejudice to the non-moving party in the case of an amendment to pleadings when it stated:

> "Had plaintiff sought leave to amend at the time he filed his expert witness statements, the choice faced by the trial judge would have been a different one. On these facts, however, we are not disposed to overturn the exercise of the District Court's discretion." (App. 14)

REASONS FOR GRANTING WRIT

I. In Violation Of Due Process Of Amendment V and Amendment XIV The Cirucit Court Did Not Judicially Review The Erroneous Decision Of The District Court Which Excluded An Amendment By Its Misinterpretation of A State Procedural Rule Which Abrogated A Rule Of Federal Procedure.

When the plaintiff moved to amend the Complaint after the death of the decedent, Ginger Deasy, in order to name her husband as personal representative of her estate, and in order for him to assert a claim for wrongful death on behalf of himself and the parties' two sons, it reiterated an allegation of negligence which it first made three months after filing suit, and approximately three months before trial of the case, to begin October 14, 1986.

The defendant opposed that motion to amend but did not assert that it would be prejudiced in defending against that claim on the merits of that allegation. The defendant had deposed the expert witnesses of the plaintiff, and had consulted expert witnesses who were designated as witnesses to appear in the case. The defendant did not claim that she was unprepared to proceed to trial

on the issue of negligent performance. (App. 37-46)

In any event, neither by written opposition, (App. 29-36), nor in argument, (App. 37-46) did the defendant assert that the granting of the motion would be prejudicial to her at time of trial, nor did she indicate that it would be necessary to have additional discovery, or to continue the case for that purpose.

The sole argument raised by the defendant was that an amendment to a complaint should not be allowed in a federal case to vary the nature of the allegations against a defendant in a medical negligence case.

The defendant claimed that this should be controlled by the state statute which permits a defendant, upon notice of a claim in advance of filing suit, to seek a medical malpractice arbitration panel to hear the case prior to the matter being heard on pleadings in a court, federal or state. (App. 43,44)

The defendant claimed that she would have sought such a panel had the allegation of

negligent performance been asserted initially, and, thus, granting amendment of the complaint would deprive her of the opportunity which she had waived when notice was first given. (App. 43, 44)

The magistrate did not consider any other issue, and specifically did not consider the issue of prejudice in the defense of the claim on the merits, but the plaintiff was denied the amendment.

This decision was improper, because Rule 1 of the Federal Rules of Civil Procedure makes clear that the Federal Rules govern the procedure in all suits of a civil nature in the United States district courts. Once an action is transferred to the federal court, all procedural dispositions are made pursuant to the Federal Rules as though the action was always in the federal court only. Wright and Miller, Federal Practice and Procedures, Volume 4, Section 1024. Thus, the propriety of amending a complaint in the case is controlled by Rule 15.

The Court of Appeals disregarded the Federal Rules, and disregarded the reasons advanced by the

defendant in argument, and the basis of the improper ruling by the magistrate in affirming denial of the plaintiff's motion to amend the complaint, to state formally the negligent performance allegation. A state can statutorily set forth requirements necessary before suit can be filed, including the necessity to give notice to a physician as to the nature of the claim. However, when notice is given, and the opportunity for a medical malpractice panel is waived, as it was by the defendant in this case, there cannot be an abrogation of the operation of the Federal Rules of Procedure by virtue of the state statute in its limited and strict application. To do so would be contrary to the Supreme Court ruling in Walker v. Armco Steel Corporation, 446 U.S. 740, 64 L.Ed. 2d 659, 100 (S.Ct. 1978), which recognizes substantive rights, but does not brook interference with federal procedures The District Court's ruling is also directly contrary to Rules 1 and 15 of the Federal Rules of Civil Procedure.

II. The Court Of Appeals Did Not Affirm On The Same Basis As The District Court, But On The Issue Of Prejudice To The Defendant, Upon Which There Had Not Been Assertions By The Defendant's Argument Before The Magistrate Of The District Court, Or A Finding By The Magistrate. This Was Contrary To Due Process Under Amendment V and Amendment XIV Of The United States Constitution.

The magistrate denied the Motion to Amend, but did not do so on the basis of prejudice to the defendant in the defense of the allegation on the merits at trial.

The Court of Appeals made a factual finding of prejudice to the defendant, and sets forth its reasons which have no basis in fact, and were not ruled upon by the District Court, in excluding the amendment of the complaint prior to trial. The Circuit Court found that the defendant had not hired any experts, when that was not the case. The Circuit Court had stated that there would not have been time for the defendant to have properly prepared for the amendment, (App. 9, 10) and yet the defendant had taken the depositions of the expert witnesses who had asserted that the performance of the Pap smear was negligent. The defendant did in fact have witnesses and

designated them, including a gynecologist, an internist, and a gynecological surgeon. Most pointedly, the defendant does not allege that it would have been prejudiced by the amendment, and the District Court did not consider the question at the time of the hearing, and made no ruling or finding of prejudice. (App. 45,46) It was clearly contrary to Amendments V and XIV of the United States Constitution which requires due process in all court proceedings for a Court of Appeals, sua sponte, to conjure or construct its own finding of prejudice to the defendant without factual basis and not as part of an appellate review process of a lower court's action.

III. The Opinion In The Instant Case Which Holds That Delay And Formal Amendment Can Serve As A Basis of Denial For Amendment of Pleadings Is In Direct Conflict With Other Federal Circuits Which Hold That The Existence Of Prejudice Is The Touchstone In Permitting Or Denying Amendment To Pleadings.

13. The Circuit Court, in its opinion stated: (App. 14)

> "It would not be desirable to have discovery statements serve as amendments to

> the pleadings. Parties should not be encouraged to plead in this tentative and whimsical fashion, advancing their own cases while keeping their opponents off balance. Had plaintiff sought leave to amend at the time he filed his expert witness statements, the choice faced by the trial judge would have been a different one."

The Circuit Court, therefore, found that despite the fact a defendant was not prejudiced by a delay, that a failure to make an amendment to the pleadings was still crucial. The defendant, by virtue of her failure to claim any prejudice to defend against the claim of negligent performance on the merits, demonstrated that the formal change of the complaint was meaningless, but the Circuit Court subordinates the effect upon the parties of the amendment, and thus denies the plaintiff an opportunity to have a trial of an issue on the merits in order to discourage litigants from delaying the making of formal amendments, even when their effect is not, in actuality, detrimental to the other litigant involved in the

case. This holding is contrary to the holdings of other circuits. See Roberts v. Arizona Board of Regents, 661 F.2d 796 (9th Cir. 1981), Estes v. Kentucky Utilities, 636 F.2d 1131 (6th Cir. 1980), Mercantile Trust Company National Ass'n. v. Inland Marine Products Corporation, 542 F.2d 1010 (8th Cir. 1976), and Howze v.Jones and Laughlin Steel Corp., 750 F.2d 1208 (3rd Cir. 1984).

IV. The Circuit Court Acknowledges Its Own Holdings In Other Cases Which Assert That Undue Delay Will Not Be Sufficient To Deny A Trial On The Merits When The Non-Moving Party Has Not Been Prejudiced.

Sweetheart Plastics, Inc. v. Detroit Forming, Inc., 743 F.2d 1039, 1044 (4th Cir. 1984), Davis v. Piper Aircraft Corporation, 615 F.2d 606, 613 (4th Cir. 1980). A case decided two weeks previously recognized this principle; Island Creek Coal Company v. Lakeshore, Inc., 832 F.2d 274, 279.

V. The Supreme Court Of The United States Has Consistently Subordinated Form For Substance And Has Decried The Denial Of A Trial On The Merits In Order To Adhere To Formal Niceties.

Most significantly, this Court has long since

held that form shall not triumph over substance,

> "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome, and accept the principle that the purpose of the pleading is to facilitate a proper decision on the merits."

Conolly v. Gibson, 355 U.S. 41, 48, 78 S.Ct. 99, 103, 2 L.Ed. 2d 80. This has been more recently affirmed in Foman v. Davis, 371 U.S. 178, 83 (S.Ct. 227, 1962). Other federal circuits have adhered to this principle and have been guided by these expressions, but the holding in the instant case creates a threat to uniformity, and more importantly, does violence to the interpretation of this Court in its supervisory role regarding the Federal Rules of Procedure, which are applicable to all circuits.

CONCLUSION

THIS COURT SHOULD RECOGNIZE THE DENIAL OF ACCESS TO A TRIAL ON THE MERITS SUFFERED BY THIS PETITIONER, AND IN THE EXERCISE OF ITS SUPERVISORY POWERS, ORDER UP THE RECORD AND GIVE PLENARY CONSIDERATION TO YOUR PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI.

Respectfully Submitted,

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APPPENDIX

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 86-2648 (L)

CHARLES R. DEASY,
Personal Representative of the
Estate of Ginger Deasy, Deceased

Plaintiff-Appellant,

versus

ELIZABETH H. HILL,

Defendant-Appellee.

No. 86-2662

CHARLES R. DEASY
Personal Representative of the
Estate of Ginger Deasy, Deceased,

Plaintiff-Appellee,

versus

ELIZABETH H. HILL,

Defendant-Appellant.

Appeal from the United States District Court for

the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., Chief District Judge. (CA-86-376).

Argued: June 30, 1987-Decided: November 9, 1987

Before PHILLIPS, ERVIN, and WILKINSON, Circuit Judges.

Robert J. Stanford for Appellant; Jacqueline Kathleen O'Shea Poux (R. Harrison Pledger, Jr. on brief) for Appellee.

WILKINSON, Circuit Judge

Charles Deasy, and his wife, Ginger, brought a malpractice action against Elizabeth Hill, M.D. alleging that the latter's negligence diminished Ginger's chances of surviving cancer of the cervix. They alleged that Hill had failed to notify Ginger of the abnormal results of a Pap smear or of the need for reexamination. After Ginger died and immediately before trial, Charles Deasy moved to amend his complaint to add a claim that Hill had performed the pap smear negligently. The district court refused to allow the amendment, and the case proceeded to trial solely on the issue of Hill's alleged failues of notification. The jury returned a verdict for Hill, and Charles Deasy appeals the Distict Court's refusal to allow amendment of the complaint.

We affirm.

On January 13, 1984, complaining of weight loss and abdominal pain, Ginger Deasy saw the defendant at her office in Falls Church, Virginia. Hill performed a physical examination on Deasy, which included a Papanicolau ("pap") smear, a procedure commonly used to detect cancer of the uterus and cervix. Hill submitted the pap smear to a pathology laboratory for examination and analysis.

Several days later, the laboratory forwarded to Hill the results of its examination, which indicated the presence of atypical cells. The laboratory recommended that Deasy be reexamined. Hill claims that she informed Deasy of the test results and the need to repeat the test. Charles Deasy contends that Hill failed to notify his wife of either the test results or the need for a reexamination.

In the year following her visit to Hill's office, Deasy and her husband moved to Annapolis, Maryland. When, in early 1985, Deasy began to

experience abnormal vaginal bleeding, she saw physicians in the Annapolis area, who examined her and discovered cancer of the cervix.

Ginger Deasy filed suit in January 1986, claiming malpractice in Hill's failure to notify her of the pap smear results and the need for reexamination. That suit was dismissed without prejudice by the district court because Deasy had failed to comply with Virginia's Medical Malpractice Act, which forbids the bringing of a malpractice action against a health care provider before the provider is given notice of the impending claim and an opportunity to seek review by a medical malpractice review panel. Va. Code §8.01-481.2 (1987 Cum. Supp.). Deasy refiled her suit in April, 1986. Defendant moved for summary statute of limitations, but that motion was

denied.*[1].

Ginger Deasy died before the suit came to trial. Her husband, Charles, moved immediately before the trial to amend the complaint, to convert the personal injury action into a wrongful death action, and to substitute himself, as personal representative of Ginger Deasy's estate, as plaintiff in the case. The amended complaint also sought to add to the allegation that Hill had failed to inform Ginger of the pap smear results a claim that Hill had performed the pap smear negligently. Plaintiff asserted that the amended complaint added no new claim, because defendant

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*1 Defendant appeals the district court's denial of her motion for summary judgment. In view of our decision in favor of the defendant, however, we need not reach the state law issues presented by defendant's cross-appeal.

had been made aware of the negligent performance claim through discovery. Defendant responded that the negligent performance claim was new and should not be allowed.

The District court refused to allow the addition of the negligent performance claim. The case proceeded to trial solely on the issue of defendant's failure to notify Deasy of the pap smear results, and the jury rendered a verdict in defendant's favor.

II.

Rule 15(a) of the Federal Rules of Civil Procedure allows amendment of pleadings by leave of the court. While this rule states that "leave shall be freely given when justice so requires," Fed. R. Civ. P. 15(a) (1987), leave to amend is not to be granted automatically. Disposition of a motion to amend is within the sound discretion of the district court. Foman v. Davis, 371 U.S. 178,

182 (1962); Gladhill v. General Motors Corp., 743 F.2d 1049 (4th Cir. 1984). A motion to amend under Rule 15(a) may be denied where the motion has been unduly delayed and where allowing the amendment would unduly prejudice the non-movant. Davis v. Piper Aircraft Corp., 615 F.2d 606, 613 (4th Cir. 1980); Woodson v. Fulton, 614 F.2d 940, 943 (4th Cir. 1980). Undue delay and prejudice are both present in this case.

The original complaint alleged malpractice in Hill's failure to inform Deasy of the results of the pap smear, and in her failure to reexamine Deasy. The complaint made no mention of Hill's allegedly negligent performance of the pap smear itself. In July 1986, plaintiff filed two expert witness statements pursuant to Fed. R. Civ. P. 26(b)(4)(A), both of which stated that defendant had been negligent in her performance of the pap smear. Yet, despite his awareness of this alleged negligence, plaintiff did not act to amend his complaint until nearly three months later, just

before trial, in October, 1986.

In the circumstances of this case, plaintiff's delay was undue. Plaintiff failed to offer to the trial court, and does not offer here, any reason for his delay. In fact, plaintiff's argument that defendant was not surprised by the new claim because she had been made aware of it through the expert witness statements, shows the absence of any such reason. The burden rests primarily upon the plaintiff to amend his complaint, not upon the defendant to anticipate a new claim.

Moreover, "a motion to amend should be made as soon as the necessity for altering the pleading becomes apparent. A party who delays in seeking an amendment is acting contrary to the spirit of the rule." 6 Wright & Miller, Federal Practice and Procedure §1488 (1971). Amendments near the time of trial may be particularly disruptive, and may therefore be subject to special scrutiny. See First National Bank of Louisville, v. Master Auto

Service Corp., 693 F.2d 308, 314 (4th Cir. 1982) (Motion to amend properly denied when made nineteen days before trial and where amendment was not the result of movant's discovery of new facts); Woodson, 614 F.2d at 942-43 (denial of leave to amend upheld where plaintiff, who had been aware for some time of the new claim, moved to amend immediately prior to trial). Here the delay was significant, and the motion to amend came right before trial and after discovery was complete. In these circumstances, the district judge was entitled to regard the delay as unwarranted.

Delay alone, without prejudice, does not support the denial of a motion for leave to amend. Sweetheart Plastics, Inc. v. Detroit Forming, Inc., 743 F.2d 1039, 1044 (4th Cir. 1984); Davis, 615 F.2d at 613. Plaintiff asserts that there would be no prejudice in this case. He contends that Hill was adequately prepared to litigate the new claim because plaintiff's expert

led her to depose plaintiff's experts on the issue of negligent performance of the pap smear.

We do not believe, however, that Hill had the opportunity to which she was entitled for discovery on the issue. A complaint is meant to state the issues of a case so that the parties can conduct discovery and present their cases intelligently. Hinting at a claim in an expert witness statement leaves the opposing party guessing at one's real intentions. The original complaint led defendant to believe that plaintiff did not claim negligent performance, and defendant could quite sensibly have decided not to commit her resources to a shadowy claim that plaintiff may or may not have been serious about raising. Defendant may have deposed plaitniff's experts on the issue; that was a natural precaution since the issue was raised in their statements. But defendant did not make any affirmative effort to disprove negligent performance. She did not, for example, hire her own experts to testify that her

performance of the pap smear was not negligent, and it is doubtful that she would have had time to do so before trial. It would be manifestly unfair to require defendant to go to trial without a fair opportunity to prepare her case or to take anything more than the most minimal precautionary measures.

Even had trial been continued upon allowance of the amendment, defendant would nonetheless have been prejudiced. The original complaint alleged negligence only in Hill's failure to inform Ginger Deasy of the pap smear results or of the need for reexamination. Thus cast, the complaint raised a purely factual question, the resolution of which required no medical expertise. In seeking to add the allegation that Hill had failed to meet the applciable standard of care in performing the pap smear, the plaintiff sought to raise an issue of medical competence and to alter substantially the nature of the lawsuit. The proof required to

defend against this new claim would be of an entirely different character than the proof which the defendant had been led to believe would be necessary. Belated claims which change the character of litigation are not favored. See Isaac v. Harvard University, 769 F.2d 817, 829 (1st Cir. 1985) (No abuse of discretion where district court denied amendment which would "very materially change the nature of the complaint"); Mercantile Trust Co. v. Inland Marine Products Corp., 542 F.2d 1010, 1013 (8th Cir. 1976) (no abuse of discretion where district court refused to allow late amendment which would add new theories of defense and which "would necessarily reopen much fo the discovery").

With respect to the new claim, the defendant may well have been entitled under Virginia law to a review of the negligent performance claim by a medical malpractice review panel.*[2] See Va. Code §8.01-581.1 et seq. (1984 & 1987 Cum. Supp.) The panel would consist of impartial attorneys and

health care providers, and would be chaired by a state court judge. Va. Code §8.01-581.3. It would recieve evidence and could conduct a hearing into whether the defendant had met the applicable

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*2 We assume, without deciding, that defendant would have been entitled to such review. Defendant asserts that a request for such review would not be timely, and would therefore be foreclosed, under state law. Should defendant's view of Virginia law prove correct, and had review been unavailable, the prejudice to defendant of allowing the amendment would obviously be great. Because we find sufficient prejudice to the defendant to support the district court's ruling even if review had been available to defendant, we do not find it necessary to decide this question of Virginia law.

standard of care, Va. Code §8.01-581.7. The opinion would be admissible as evidence at trial, and either party could call panel members to testify at trial. Va. Code §8.01-581.8.

Since this system was implemented in 1976, the median time for conclusion of a review from the initial request to issuance of a panel opinion has been slightly over eight months. Daughtrey & Smith, Medical Malpractice Review Panels in Operation in Virginia, 19 U. Rich. L. Rev. 273, 287-88 (1985). An additional eight months would nearly have doubled the time between plaintiff's filing of the original complaint in this action and the trial. While plaintiff is not responsible for the length of time the malpractice review might take, the burden to defendant would have been greatly reduced had plaintiff moved to amend when the negligent performance claim first became apparent, when discovery was still in progress and before the parties were ready to go to trial.

The Federal Rules are designed to function as "a means to the proper presentation of a case; ... they are to assist, not deter, the disposition of litigation on the merits." 3 Moore's Federal

Practice §15.02[1] (1985). While the notice pleading contemplated by the Federal Rules deemphasizes technical necessity, trial courts retain the power to ensure that pleadings perform their proper function of framing the issues and facilitating the fair conduct of litigation. It would not be desirable to have discovery statements serve as amendments to the pleadings. Parties should not be encouraged to plead in this tentative and whimsical fashion, advancing their own cases while keeping their opponents off balance. Had plaintiff sought leave to amend at the time he filed his expert witness statements, the choice faced by the trial judge would have been a different one. On these facts, however, we are not disposed to overturn the exercise of the district court's discretion.

III.

Finally, plaintiff urges that the trial court erred in instructing the jury on contributory negligence. After her initial consultation with

defendant, Ginger Deasy consulted with Dr. James Cooper for treatment of ulcers. She was hospitalized under Dr. Cooper's care in February and March, 1984. Cooper testified that he was unaware of Deasy's earlier pap smear, but that he advised Deasy, upon her discharge from the hospital, to return to the defendant. Hill also introduced a notation in Deasy's medical record, and a statement from a hospital nurse, both stated that Deasy was advised upon her discharge from the hospital in March, 1984 to return to defendant Hill.

Plaintiff now contends that the Trial Court erred in instructing the jury that Deasy could be found contributorily negligent, and her recovery barred, if she failed to exercise ordinary care in following the orders of her doctors, including the orders of Dr. Cooper, to return to defendant. Plaintiff claims that this instruction was erroneous because Dr. Cooper, not knowing of the results of the pap smear, had given Deasy no

compelling reason to return to the defendant.

We need not address this contention, because the trial court's instruction clearly confined the issue of contributory negligence to the question of whether Deasy failed to exercise ordinary care by not returning to defendant after being informed of the abnormal pap smear results. The Court stated:

> "[I]t was the duty of the decedent, Ginger Deasy, to exercise ordinary care to follow the orders or directions given to her by the physicians, or her physician, with regard to returning for reexamination or further tests or followup on the first abnormal Pap test. If you believe from a preponderance of the evidence that the defendant notified the decedent to come in or return or make arrangements for such reexamination or further tests or followups, and the decedent failed to do so, then the decedent was contributorily negligent.

Any confusion introduced by the trial jduge's use of the word "physicians" was clarified by the remainder of the instruction, which referred solely to defendant Hill.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT
For The Eastern District of Virginia

GINGER DEASY	)	
	)	
Plaintiff,	)	CIVIL ACTION NO. 86-0376-A
	)	
v.	)	
	)	
ELIZABETH HILL, M.D.	)	
	)	
Defendant.		

PLAINTIFF'S EXPERT WITNESS STATEMENT
PURSUANT TO F.R.C.P. 26(b)(4)(A)

Pursuant to F.R.C.P. Rule 26(b)(4)(A) and in response to interrogatories numbered 6 and 7 of the defendant's interrogatories to the plaintiff, the plaintiff hereby indicates that she will offer as an expert witness Dr. Gary B. Witman, whose address is 64 Hazard Street, Providence, Rhode Island 02906, and whose specialty within the field of medicine is oncology. On the basis of the information in the medical records of the plaintiff that have been provided to the defendant, including those of the defendant

herself, Dr. James Cooper, Dr. Joseph Friend, Dr. Joseph Moser, Dr. Neil Rosenshein, The Johns Hopkins Hospital, and the American Medical Laboratories, and on the basis of plaintiff's testimony at her de bene esse deposition concerning her treatment by and communications with the defendant and these other doctors, and her prior history, Dr. Witman is prepared to testify as follows:

1. An atypical Pap smear result may be an indication of pre-cancerous growth or an early stage of cervical malignancy. In order to ascertain the presence or absence of pre-cancerous growth or cervical malignancy in a patient with an atypical Pap smear result, the standard of care applicable to this case requires that a repeat Pap smear be obtained from the patient in 2-3 months. The passage of this period of time allows the clearing of transient inflammation that may be responsible for the atypical result, and also allows the regrowth of pre-cancerous tissue in the area of

the initial sample. If the repeat Pap smear produces an atypical or abnormal result, the standard of care applicable to this case would call for prompt further analysis through colposcopy with the aid of staining, and dilation and curretage with pathological examination of the curretings. Upon findings positive for cancer from these procedures, the applicable standard of care would require prompt surgical intervention to remove the cancer, either through a conization or a hysterectomy.

2. The standard of care applicable to this case requires that a patient be promptly informed of a Pap smear result which is other than normal, and of the facts that this other-than-normal result may be indicative of cancer or potentially cancerous tissue and that a repeat Pap smear is required in two to three months to determine whether the possibly or potentially cancerous situation is still present.

3. The failure of the defendant to notify the plaintiff of the atypical Pap smear result of

January 16, 1984 constituted a violation of the applicable standard of care, and resulted in a delay in diagnosis of the plaintiff's cervical cancer of at least 12 months.

4. On the basis of the stage of the plaintiff's cancer when diagnosed in May 1985, as indicated in the medical records of Dr. Rosenshein and The Johns Hopkins Hospital, the atypical Pap smear result of January 16, 1984, was, to a reasonable degree of medical certainty, an early sign of the cancer that was ultimately diagnosed in May 1985, and that continued to advance and grow without interruption from January 1984 until the onset of treatment after the May 1985 diagnosis.

5. A repeat Pap smear on the plaintiff as required by the applicable standard of care would have produced, with a reasonable degree of medical certainty, an atypical or abnormal result, which would have led to diagnosis of the plaintiff's cancer at least 12 months prior to the time when such diagnosis actually occurred.

6. In performing a Pap smear, the standard of care applicable to this case requires that samples be taken from both the cervical and endocervical areas. Failure to take a sample from the endocervical area would cause a concentration of cancerous or pre-cancerous cells in that area either to go wholly unnoticed or to be misdiagnosed as to stage or level of advancement.

7. The defendant's own entries on the Pap smear request form for the Pap smear taken of the plaintiff on January 13, 1984, indicate that she violated the applicable standard of care by taking a smear or sample only from the cervix and not from the endocervix as well. Based upon the diagnosis of Dr. Rosenshein of the plaintiff's cervical cancer as a Stage 1b barrel lesion, the defendant's failure to take a smear from the endocervical area caused the Pap smear report to be misleading in its assessment of atypia with displasia rather than a more advanced stage of cancer.

8. Had the defendant taken her Pap smear of

the plaintiff properly, the resulting report from the American Medical Laboratories would, to a reasonable degree of medical certainty, have been designated as abnormal rather than atypical, and would have shown plaintiff's cancer to be more advanced than the actual report showed. The applicable standard of care would have required that this abnormal result be followed up promptly by colposcopy and dilation and curettage, with pathological examination of the curettings, and that the intermediate step of a repeat Pap smear be deleted. The colposcopy and pathological examination of the curettings, to a reasonable degree of medical certainty, would have confirmed the existence of cervical cancer and thus indicated prompt surgical intervention, either by conization or hysterectomy. This surgical intervention would have occurred in January or February, 1984.

9. Proper examination and surgical intervention in the spring of 1984, would have resulted, with reasonable medical certainty, in a

complete cure of plaintiff's cancer with a probability within the range of 70-95%. A hysterectomy at this time would, to a reasonable degree of medical certainty, have enabled the removal of plaintiff's cancer while it was strictly confined to the cervical area, and before it would have grown in size and spread to other parts of the plaintiff's body through the metastasis process. Earlier treatment in January or February, 1984, would have improved the probability of complete cure within the above-mentioned range.

10. As a proximate result of the delay in diagnosis and treatment caused by defendant's violations of the applicable standard of care, and the consequent growth and spread of her cancer within her body during this period of delay, the plaintiff will almost certainly die of her cancer in 1986. The spread allowed by the delay, through both growth of the lesion in the cervical area and micrometastatic spread of cancer cells to other parts of the body, has, to a reasonable degree of

medical certainty, disenabled effective elimination of the cancer from plaintiff's body.

In addition to Dr. Witman, plaintiff also anticipates producing as an expert witness a gynecological oncologist. Plaintiff's counsel has consulted with this doctor substantially concerning this case, but due to scheduling problems has not yet obtained the doctor's final assent to participation as an expert witness. Nevertheless, the doctor is expected to be prepared to supply testimony in accord with the opinions and reasons articulated above on behalf of Dr. Witman, and is not expected to supply testimony in areas other than those covered above. As soon as final assent is obtained from the doctor, his identity will promptly be disclosed.

As defense counsel knows, plaintiff has not yet had an opportunity to depose the defendant. Plaintiff reserves the right to supplement this statement on the basis of information elicited from the defendant in deposition which is not

contained in her medical records. Defense counsel has indicated that the defendant will be made available for deposition on Saturday, August 2, 1986, but that earlier availability is precluded by their own trial and vacation schedules. Plaintiff herein expresses a willingness to depose the defendant at an earlier time in order that all information that she may provide relevant to the issues in this case will be available for use by all parties at the earliest possible date.

s/Gregory M. Wade
Gregory M. Wade
616 N. Washington Street
Alexandria, Virginia 22314
(703) 836-9030

s/Robert J. Stanford
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Washington, D.C. 20006
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Plaintiff's Expert Witness Statement Pursuant to F.R.C.P. Rule 24(b)(4)(A) was hand delivered on the 17th day of July, 1986 to: J. Kathleen O'Shea Poux, Esq. and J. Harrison Pledger, Esq., attorneys for defendant Hill, at: 1489 Chain Bridge Road, Suite 204, McLean, Virginia.

s/Robert J. Stanford
Robert J. Stanford

UNITED STATES DISTRICT COURT
For The Eastern District of Virginia

GINGER DEASY

Plaintiff C.A. No. 86-0376-A

v.

ELIZABETH HILL, M.D.

Defendant.

ELIZABETH HILL, M.D.'s MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND THE COMPLAINT

Elizabeth Hill, M.D., by counsel, files this opposition to plaintiff's Motion for Leave to Amend the Complaint as to any allegations of negligence not raised in the original Complaint filed in January, 1986. This Court has designated the January Complaint to be the notice required by Section 8.05-581.1 et seq. of the Code of Virginia.

Plaintiff's Memorandum of Points and Authorities, paragraph number 6 states:

> Besides the allegations necessary to convert this action to a wrongful death claim, as required by statute, the amended complaint attached hereto introduces no claim or other

matter that has not already come to light in discovery."

Plaintiff cites sections of the Code of Virginia in support of her motion.

FACTS

This case was initiated in January, 1986 when plaintiff filed a complaint in this Court. This complaint was dismissed by Judge Hylton for failure to give the notice required under Sect. 8.01-581.1 et seq. of the Virginia Code. Plaintiff then filed the current lawsuit against Dr. Hill. Dr. Hill filed a Motion for Summary Judgment which stated that plaintiff had failed to comply with the notice requirements of the Virginia Code, had failed to give notice within the prescribed period of limitaitons and therefore the complaint was barred. This Court denied the Motion for Summary Judgment.

The original Complaint contains only the allegation that "defendant Hill negligently neither informed plaintiff Ginger Deasy of this finding of atypia and the recommendation for re-

examination nor did defendant Hill conduct such re-examination." See paragraph 4.

In the Amended Complaint plaintiff attempts to add a new allegation. Paragraph 4 states:

> "In performing this Papanicolaou smear, defendant Elizabeth H. Hill, M.D., negligently and in violation of the applicable standard of care took samples only from the vagina andcervix and failed to take a sample from the endocervix."

In addition, new allegations are referred to in other paragraphs.

Sect. 8.01-581.2 of the Code of Virginia states in part:

> "No action may be brought...unless the claimant notifies such health care provider...prior to commencing the action. The written notification shall include...a reasonable description of the act or acts of malpractice...."

This court construed the complaint filed January, 1986 as the required notice. There is no allegation contained in that complaint concerning a violation of the applicable standard of care in taking or performing a pap test. The amended

complaint makes such a specific allegation of negligence.

Therefore the issue before this Court is whether the allegation contained in the first complaint gave a reasonable description of the negligent act claimed in the Amended Complaint. Defendant submits that it did not. The only reference to the pap test in the original Complaint was that it was performed by Dr. Hill on January 13th and the laboratory results were forwarded to Dr. Hill on January 15, 1984. It does not describe as an act of malpractice the method used to obtain the pap smear; it does not even address that issue. Yet the Amended Complaint now sets that out as a specific act of negligence. To permit such an amendment would further contravene the provisions of Sect. 8.01-581.1 et seq. of the Code of Virginia.

In 4 Va. Cir. 68 (Oct. 19, 1962), Judge Grenadier denied plaintiff's motion to amend and add a claim against Alexandria Hospital because

notice was not given of that claim and found that such ntoice was an absolute prerequisite to the maintenance of a cause of action. As Judge J. Howe Brown said in 3 Va. Cir. 349 (April 1, 1985) "the operative question in this Motion to Dismiss is whether the notice gives a reasonable description of the acts alleged in the Motion for Judgment."

It is Dr. Hill's position tht no notice was given of this new allegation of negligence. In addition, plaintiff is raising this issue long after pre-trial and only one week prior to trial. There are other specific allegations in the amended complaint that are not contained in the original complaint which this court found to be "ntoice". See paragraphs 6 and 8. In addition, plaintiff continues to ignore Sect. 8.01-581.1 et seq. by demanding the amount of Two Million Dollars. The purpose of the Virginia Medical Malpractice Statute is to prevent this type of situation and for these reasons Dr. Hill

asks the court to deny plaintiff's motion to amend the complaint by introducing new allegations.

These new allegations are also barred by the applicable statute of limitations as a notice of claim will only toll the statute of limitations when the notice is given prusuant to Sect. 8.01-581.2.

WHEREFORE, Elizabeth H. Hill, M.D., respectfully moves this Court to deny plaintiff's Motion to Amend as to any new allegations of negligence.

Respectfully submitted,
Elizabeth H. Hill, M.D.
By Counsel

s/R. Harrison Pledger, Jr.
R. Harrison Pledger, Jr.

s/J. Kathleen O'Shea Poux
J. Kathleen O'Shea Poux

s/Cynthia L. Vancil
Cynthia L. Vancil

1489 Chain Bridge Road
Suite 204
McLean, Virginia 22101

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Opposition was hand delivered, this 8th day of October, 1986, to Gregory M. Wade, Esquire., 616 N. Washington Street, Alexandria, Virginia 22314, and to Robert J. Stanford, Esq., 1825 K Street, Suite 711, Washington, D.C. 20006, attorneys for plaintiff.

s/J. Kathleen O'Shea Poux
J. Kathleen O'Shea Poux

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

GINGER DEASY,

Plaintiff

v. C.A. #86-373-A

ELIZABETH H. HILL, M.D.

Defendant

Alexandria, Virginia
Friday, October 10, 1986

The proceedings commenced at 11:15 a.m.

BEFORE:

THE HONORABLE W. HARRIS GRIMSLEY
United States Magistrate.

APPEARANCES:

GREGORY A. COTTER, Esq., counsel for the plaintiff.

CYNTHIA L. VANCIL, Esq., counsel for the defendant

P R O C E E D I N G S

THE DEPUTY CLERK: Civil Action 86-376-A, Ginger Deasy versus Elizabeth H . Hill, M.D. Are the parties present and ready to begin?

MR. HUGHES: Good morning, your Honor. Thomas Hughes appearing as local counsel on behalf of the plaintiff Deasy. I would like to introduce plaintiff's counsel today, Greg Cotter.

MR. COTTER: Good morning, your Honor.

THE COURT: Good morning.

MR. COTTER; This is a motion to amend the complaint in a medical negligence case.

THE COURT: Ginger Deasy was the original plaintiff and alleged injury and negligence and now she has died?

MR. COTTER: That is correct.

THE COURT: And you propose under the Virginia Code to substitute her personal representative?

MR. COTTER: That is correct.

THE COURT: Has a personal representative

been appointed?

MR. COTTER: Yes.

THE COURT: All right. Any objection by the defendant?

MS. VANCIL: There is no objection to amending the complaint for that particular purpose.

THE COURT: All right. What else is before the Court then?

MR. COTTER: Well, perhaps it would be more appropriate for her to speak to that in the outset because what we did, we had to amend the complaint at the outset anyway because of the wrongful death aspect.

Essentially we brought it up to date by --

THE COURT: Which the Virginia Code will permit you to do.

MR. COTTER: I think so.

THE COURT: 56 of the Virginia Code?

MR. COTTER: Actually that section idnicates that the complaint shall be amended. But, in addition, it specifically states the wrongful

death changes. We brought the complaint up to date in terms of liability by including with it a liability claim of negligence that was made in the plaintiff's expert witness statements back in July which wasn't specifically included in the original complaint.

I think that is the source of the defendant's problem. I don't think their objection to that is legitimate.

The bottom line is this. Back in July -- July 17, specifically -- the plaintiff's expert witness statement indicated specific allegations of negligence that the plaintiff's expert witness was going to testify to that were included in a general way in the original complaint but that weren't specifically stated as such, and that expert witness statement was issued before the defendant's deposition was taken and before, obviously, the plaintiff's expert witnesses' depositions were taken.

THE COURT: This thing is set for trial on

the 14th, isn't it?

MR. CARTER: That is correct. This supposed new allegation ahs been hashed and rehashed and the situation really is such that if the plaintiff had not died, we would have just gone ahead and gone to trial and tried the case.

THE COURT: Are the issues any different?

MR. COTTER: The issues aren't any different now than they were back in July. So, I don't see any problem.

THE COURT: Well, let me hear from the defendant.

MS. VANCIL: Thank you, your Honor. I am Cynthia Vancil.

THE COURT: You are with Harrison Pledger's firm?

MS. VANCIL: Yes, sir. Your Honor, the real that in January of this year, he filed, I believe, a complaint.

That complaint was dismissed because they had failed to follow the medical malpractice rules

of practice in Virginia which required notice to a physician prior to filing of any complaint and then another complaint was later filed.

THE COURT: In compliance with the Virginia Code, I assume.

MS. VANCIL: That was not filed in compliance either but it was determined by the jduge pursuant to the defendant's motion for summary judgment that the original complaint in January of 1986 would be the notice that is required pursuant to Virginia Code.

So, the January, 1986 complaint was now the notice to, pursuant to the Code, and it did not contain any allegations whatsoever against Dr. Hill about an improper PAP test being done and about the procedure being done improperly.THE COURT: That was the allegation. That is the whole guts of the case, wasn't it?

MS. VANCIL: No. As to Dr. Hill, the only thing that was contained in the notice and in the subsequent complaint was that she had failed to notify the plaintiff of the results and perform a

reexamination.

At no time was there any mention that she improperly performed the PAP test.

The whole purpose of the Virginia medical malpractice rules of practice are to provide notice to health care providers and allow them an opportunity to present the matter before a medical malpractice panel.

Thjis opportunity was never presented to Dr. Hill, if this complaint is allowed to be amended, because at the time that we had an opportunity to do so, we did not do so, based on the fact that the allegations against Dr. Hill were primarily factual and there was no need to put it before a panel for expert review.

Now we have a question here of medical negligence which is not a fact question and if you were to allow the complaint to be amended to incorporate this allegation, then we would be deprived of the opportunity to put that in front of a panel.

Secondly, the Virginia Courts have

consistently held that a plaintiff cannot go foward with an allegation that is not in the original notice and I have two cases here from the Circuit Court which are directly on point which also contain further cites, if Your Honor would like to see them.

One is the case of Nunn (phonetic) v. Alexandria Hospital in which Judge Grenadier was faced with this exact same issue where the plaintiff had filed a motion and a motion containing certain allegations -- motion for judgment -- containing certain allegations and right before trial had sought to amend his complaint, and add not only some factual things --

THE COURT: You mean add a new count?

MS. VANCIL: He tried to add a new count.

THE COURT: And you are contending that is what is happening here?

MS. VANCIL: Exactly, and Judge Grenadier specifically ruled that the noticje requirement of either Code is an absolute prerequisite to maintenance of an action and he overruled his

motion to amend the complaint.

I have the opinion here if Your Honor would like to see it.

THE COURT: Well, as far as I was concerned, I thought the only issue before the Court here was the substitution of the party plaintiff.

MS. VANCIL: Your Honor, we have no objection to that. We have an objection to the language which now --

THE COURT: As I see it, the only thing necessary here is to put the name -- to provide the name of the personal representative -- who is suing Dr. Hill and go ahead with the original complaint. So ordered.

MS. VANCIL: Thank you, your Honor.

MR. COTTER: Thank you, your Honor.

(At 11:22 a.m. the proceedings in the above-entitled matter were concluded).